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THE ESPIONAGE STATUTES AND PUBLICATION OF DEFENSE INFORMATION†

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I. *Introduction: New York Times Co. v. United States*[1]

We began this lengthy study of the espionage statutes with grand designs. Our original goal, suggested by the Pentagon Papers litigation, was to elaborate the extent to which constitutional principles limit official power to prevent or punish public disclosure of national defense secrets. But this plan was short-lived. The more we considered the problem, the more convinced we became that the central issues are legislative. The first amendment provides restraints against grossly sweeping prohibitions, but it does not, we believe, deprive Congress of considerable latitude in reconciling the conflict between basic values of speech and security.

When we turned to the United States Code to find out what Congress had done, we became absorbed in the effort to comprehend what the current espionage statutes mandate with respect to the communication and publication of defense information. The longer we looked, the less we saw. Either advancing myopia had taken its toll, or the statutes implacably resist the effort to understand. In any event, whether the mote be in our eye or in the eyes of the draftsmen, we have not found it possible to deal with the espionage statutes except at forbidding length. This has cautioned us against augmenting our study by detailed efforts to spell out statutory alternatives, a task further complicated by our unfamiliarity with the Government's side of the secrecy story, particularly the extent to which important security interests have in fact been compromised by public disclosure of defense secrets. Consequently, our conclusion suggests only some general principles that should control legislative action—principles not reflected in the two proposals currently before Congress as part of the revision of the federal criminal law. The current statutes come first, and we save the rest for another day.

The New York Times commenced publication of the Pentagon Papers[2]

1. 403 U.S. 713 (1971).

2. The Pentagon Papers are officially titled "History of U.S. Decision-Making Process on Vietnam Policy." *See*, 403 U.S. at 714. Also at issue was a separate volume

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on June 13, 1971. The event created little stir until the Executive Department threatened legal proceedings to halt the presses.[3] We may not know for a long time, if ever, precisely why this unprecedented course was chosen. Current speculation, however, emphasizes the Administration's fear that budding relations with Communist China would be nipped if secrets could not be guaranteed.[4] That it is even plausible that such a bruising domestic confrontation would be undertaken to facilitate relations with Mao is a measure of the complexity and the irony of current statecraft.

The battle was soon over. Proceedings in the lower courts took a mere two weeks. The Supreme Court heard argument on June 26 and delivered its opinion on June 30. The stakes were as high as the pace was fast, for the principles that clashed were fundamental notions of national security and freedom of speech and press, the two values measured against which other interests are so often treated as but straws in a wind. Not surprisingly, however, the Supreme Court decided the case without making much concrete law. Among the ten opinions[5] produced in *New York Times Co. v. United States*, the only proposition commanding a majority of the Court was the naked and largely uninformative conclusion that on the record the Government had not met its heavy burden to justify injunctive relief against publication. Prior restraints, the Court reaffirmed, are available only in the most compelling circumstances.[6]

The central theme sounded in the opinions of the six majority Justices was reluctance to act in such difficult premises without guidance from Congress. That reluctance necessarily lost the case for the Government, which argued that, without regard to legislation, the President's constitutional powers as Commander-in-Chief and foreign relations steward entitled him to injunctive relief to prevent "grave and irreparable danger" to the public interest. The Government's brief in the Supreme Court did not even cite the espionage statutes, let alone take a position on whether the New York Times and the Washington Post had violated criminal laws by publishing the Pentagon Papers or by their conduct in obtaining and retaining the alleged

entitled "Command and Control Study of the Tonkin Gulf Incident." *See* United States v. New York Times Co., 328 F. Supp. 324, 328 (S.D.N.Y. 1971).

3. *See* S. UNGAR, THE PAPERS AND THE PAPERS 15-17 (1972). The Associated Press carried nothing on the story until Monday afternoon June 14, 1971, nor was the story carried in United Press International's "budget" of most important news. Both Senator Humphrey and Defense Secretary Laird appeared on television interview programs on Sunday, June 13. Neither was asked a single question about the Pentagon Papers.

4. *Id.* at 113-14.

5. A per curiam opinion announced the judgment of the Court. Justices Black, Douglas, Brennan, Stewart, White and Marshall each filed an individual concurring opinion. Chief Justice Burger and Justices Harlan and Blackmun wrote individual dissents.

6. The Court had stressed in an opinion issued in May, 1971, the "heavy burden" required to justify imposition of prior restraints. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). For brief discussion of whether the *Times* case is properly viewed in terms of prior restraint doctrine, *see* Kalven, *Foreword: Even When a Nation is at War*, 85 HARV. L. REV. 3, 31-34 (1971).

national defense information. When litigation moves this quickly and the underlying statutory problems are so complex, one cannot be sure that tactics represent deliberate assessments of statutory coverage rather than acquiescence to the demands of instantaneous response. Presumably, however, the Government ignored the statutes in the Supreme Court[7] because they do not expressly authorize injunctive relief, whether or not they make publication or retention criminal.[8] If publishing the papers were criminal, injunctive relief might have been thought barred, either by the principle that equity will not enjoin a crime or by an assessment that Congress explicitly declined to authorize injunction proceedings. If publication were not criminal, then Congress valued free speech higher than possible security risks, and the Court was bound to accept that judgment.

The Government's failure to discuss the legislative materials, however, did not deflect judicial focus from them. All the Justices concurring with the judgment, including the late Justice Black who found the first amendment dispositive in any event, stressed the Government's failure to premise its case on legislative authority. Thus the Supreme Court's decision resembles in result a similar failure for unadorned claims of executive power in *Youngstown Steel*.[9] Perhaps the Government would have fared better by arguing that in this context interstitial power is appropriately used to enjoin contemplated criminal behavior or to limit the consequences of completed crimes, thus testing head-on in the Supreme Court whether the espionage statutes were in fact being violated.

Accepting the premise that there was no statutory basis available for granting injunctive relief, we believe several considerations support the Supreme Court's refusal to forge new rules concerning the disclosure of national secrets. First, it has inadequate tools for the task; ad hoc evaluations of executive claims of risk are not easily balanced against first amendment language and gloss. The spacious generalities of the constitutional text

7. The Government did seek to rely on the espionage statutes in the District Court proceeding against the New York Times. *See*, United States v. New York Times Co., 328 F. Supp. 324, 328-30 (S.D.N.Y. 1971). Judge Gurfein held them inapplicable to "publishing."

The Government apparently conceded the inapplicability of 18 U.S.C. § 797 (1970) which prohibits publishing any "photograph, sketch, picture, drawing, map or graphical representation" of presidentially designated "vital military or naval installations or equipment." The applicable executive order defines all classified "official military naval or airforce . . . documents" as protected "equipment." Exec. Order No. 10104, 3 C.F.R. 298-99 (1949-53 Comp.). *See* text accompanying note 391 *infra*.

8. Solicitor General Griswold, who argued the case for the Government, later observed:

> [A] serious problem in the government's case before the Supreme Court with respect to the Pentagon Papers was that there literally was "no law" that authorized an injunction against publishing material merely because it was classified.

Griswold, *The Judicial Process*, 28 RECORD OF N.Y.C.B.A. 14, 19 (1973).

9. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See* Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3, 18 *et seq.* (1971), for suggestive analogies to *Youngstown Steel*.

provide only vague standards if, as we believe, they do not compel acquiescence in the publication of all information whatever its source, defense importance, or minimal significance for public debate. Furthermore, there are no judicial precedents even remotely analogous from which the Court could have drawn an appropriate and satisfactory rule to fit the case. Street demonstrations, apocalyptic rhetoric, obscenity, libel, and the rest of first amendment judicial fare are poor materials from which to fashion permissions and restraints on the publication of national security secrets. Moreover, even if standards could be formulated from these sources, the judicial process is not well suited to judge the risks inherent in releasing particular secrets. The task necessarily requires conjectures,[10] and adequate conjectures cannot be made without an overview of the substance and interrelationship of military and diplomatic policy that the judicial process cannot provide, a concession that only the late Justice Harlan was willing to accept.[11]

Second, dissemination of secret information often arises in the context of heated disagreements about the proper direction of national policy. A secret may be disclosed to demonstrate the futility of current policy, and one's assessment of the disclosure's impact on security will depend on one's reaction to the policy. Official efforts to suppress, therefore, trigger political debate on the broader question, and that in turn threatens the public perception of detached judgment that underlies acceptance of judicial law-making. Third, as Justice White noted in his opinion,[12] it would be particularly unsatisfactory to build a judge-made system of rules in an area where much litigation must be done in camera. Proper understanding of judicial decisions defining the scope of the first amendment is especially dependent upon full elaboration of the facts on which judgment has turned. Judicial attempts to provide the rules governing publication of defense secrets would produce little more than a series of ipse dixits as unenlightening as the per curiam opinion in the Pentagon Papers case.

Thus, the tendency to see problems of grand sweep in constitutional perspective should be resisted in the case of publication of defense information. The legislative process is better suited to accommodate the need for secrecy

10. Justice Brennan unwittingly demonstrated the point when he outrightly condemned injunctions "predicated upon surmise or conjecture that untoward consequences may result" but nonetheless saw some possibility for equitable relief where "publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." 403 U.S. at 725-27. To treat "peril" as a "consequence" is not quite fair. "Imperiling" means increasing the risks that harm will occur. The extent to which the probability of unfavorable outcome is affected by publication of sailing dates may be just as, if not more, conjectural than predicting that publication will seriously compromise negotiations already underway and make achievement of a particular position impossible. *Cf.* Manning, *Foreign Policy and the People's Right to Know*, 50 DEP'T OF STATE BULL. 868, 870-71 (1964) (revelation of specific U.S. negotiating positions "cripples our diplomacy").

11. 403 U.S. at 756-58.

12. *Id.* at 732.

with preservation of free speech about national security matters of prime political importance. General rules about specific categories of defense-related information cannot be fashioned by courts.

While the Court was therefore right to decline the executive branch's invitation to fashion judicial rules without statutory guidance, it is somewhat surprising that the Executive found it necessary to proceed without a clear statutory basis. Few problems have had a greater claim to post-war legislative concern than the issue of national security, and security is, by and large, equally compromised by the publication of secrets in newspapers or magazines available to all as it is by their transfer to foreign spies in encoded microdots. Differences in the detrimental consequences of the breach lie primarily in the hope that foreigners do not read carefully[13] and in the advantage to the would-be secret-keeper of knowing that his efforts have probably failed. The latter consideration varies in importance depending on whether the secrets revealed concern easily altered contingency plans or, by contrast, blueprints for entrenched weapons systems.

Plainly, the best way of ensuring secrecy is to keep all defense-related information from everyone outside the Government.[14] But that policy would deprive citizens of the opportunity to understand, evaluate and vote on official conduct and, to the extent that the information is scientific, would greatly retard technological progress.[15] Both the problem and the conflict in values are obvious, and one might expect that Congress had responded to it in a reasonably clear-cut way. Unfortunately, however, the legislation applicable to revelation of defense secrets was not drafted to reconcile the competing demands of national security and public debate about matters of prime political importance.

There is an additional, fundamental problem: the legislation is in many respects incomprehensible. Legal practitioners must often overlook this and accept as irrebuttable the presumption that the draftsman was an artist with a complex vision, whose canvas is coherent if only brooded upon long enough. The proposition is false, and one of the major issues presented by the espionage

13. The Roosevelt administration in 1942 contemplated prosecuting the Chicago Tribune for publishing accounts of the Battle of Midway that revealed that the United States had broken the Japanese code. Subsequently, it was ascertained that the Japanese had apparently not noticed the story. *See* S. UNGAR, *supra* note 3, at 115.

14. Evidence of what censors deem potentially useful to adversaries may be gleaned from a World War II regulation covering radio and cable transmissions to foreign countries. No mention in an international communication was permitted (except in press dispatches subject to separate regulation) of, *inter alia*: "[t]he civil, military, industrial, financial, or economic plans of the United States, or other countries opposing the Axis powers, or the personal or official plans of any official thereof"; "[w]eather conditions (past, present, or forecast)"; "[c]riticism of equipment, appearance, physical condition or morale of the collective or individual armed forces of the United States or other nations" opposing the Axis powers. U.S. Cable and Radio Censorship Regs. §§ 1801-18(d), (g), (k), 7 Fed. Reg. 1499, 1500 (1942).

15. *See* J. WIGGINS, FREEDOM OR SECRECY 109-12 (Rev. ed. 1964) (discussion of the tension between secrecy and technological advance).

statutes is how demonstrably false it must be before courts treating first amendment problems can rightly insist that they be given a more comprehensible legislative instruction.

In view of the great difficulty of understanding the espionage statutes, it is most regrettable that several Justices gave vent to irritation against the newspapers by volunteering readings of the statutes quite unnecessary to a decision in the injunction proceedings. Although the injunctions were denied, the satisfaction that would-be scoop readers might otherwise have enjoyed was thoroughly chilled by dicta amounting to admonition in several opinions that the present espionage statutes may authorize criminal sanctions against the newspapers and their reporters for their roles in the Pentagon Papers affair. Despite the Justices' warnings, no criminal liability under the espionage statutes for publication has materialized. The prosecution of Daniel Ellsberg and Anthony Russo proceeded, however, on statutory premises that would in effect criminalize publication by subjecting to liability the communication and retention activities that necessarily precede publication. That aborted proceeding has left the statutory question unresolved.

Justice White was the principal author of the warnings. His opinion, joined by Justice Stewart, detailed a construction of section 793 of title 18 that would impose criminal liability on newspapers for retaining defense secrets.[16] He noted, moreover, that "the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings"[17]—a clear reference to the traditional wisdom viewing the first amendment as less of a restraint on sending publishers to jail than it is a bar to the issuance of injunctive relief against publications. Justice Stewart wrote for himself that the criminal statutes "are of very colorable relevance to the apparent circumstances of these cases."[18] Chief Justice Burger and Justice Blackmun, in dissent, respectively registered "general agreement"[19] and "substantial accord"[20] with Justice White's views, evidencing a surprising willingness to speculate about matters extraneous to a litigation which they complained had proceeded too hurriedly for careful judgment on the relatively narrow questions briefed and argued. Justice Marshall, while not approving the construction, noted its "plausibility."[21] With opinions reaching afar in such unusual fashion, one may well ask "who won"?[22]

16. 403 U.S. at 737-38. The statute, set out in text following note 178 *infra*, makes criminal "willful" retaining of defense secrets. Justice White intimated that even though publishing such secrets might not be an offense, retaining them is. 403 U.S. at 739, n.9. We disagree with that position. *See* text accompanying note 289 *infra*.
17. *Id.* at 740.
18. *Id.* at 730.
19. *Id.* at 752.
20. *Id.* at 759.
21. *Id.* at 745.
22. Thus, Solicitor General Griswold is reported to have commented to another

The legal posture of publication of defense information cannot comfortably be left to inferences from these dicta. These tentative readings of the espionage statutes are a loaded gun pointed at newspapers and reporters who publish foreign policy and defense secrets. We have lived since World War I in a state of benign indeterminacy about the rules of law governing defense secrets. In a community where there exists consensus about the desirable ends of foreign policy and the propriety of using force to accomplish them, at least among those with access to defense secrets, the argument might plausibly be made that the Brandeisian preference for clarity and stability should be inverted. It may be better that the issues be left unsettled than settled rightly. Shared premises preclude serious security breaches, while firm rules threaten too much at their margins. But that delicate approach mandates reliance upon the presence of ambiguities, both constitutional and statutory, that do not survive many trips to the courthouse. Indeed, in the Court's first exposure to the problem of the right to publish, several Justices could not resist the temptation to discourse on the law of post-publication criminality. The urge is understandable; the unspoken rules of the defense establishment have unraveled in the pressures of the Vietnam War, and legal questions are pressed to resolution.[23]

II. The Espionage Statutes: An Overview

The major challenge in construing the espionage statutes is to give the draftsmen's language a meaning that approximates what Congress thought it was doing and what proponents of broader legislation have repeatedly insisted it has done. The framework for the present statutes is the Espionage Act of

lawyer, shortly after the decision was announced "Maybe the newspapers will show a little restraint in the future." N.Y. Times, Jul. 1, 1971, at 1, col. 8 to 15, col. 1. In April, 1972, a Justice Department official warned the press at the annual meeting of the American Society of Newspaper Editors that they run the risk of criminal prosecution for publishing classified information. N.Y. Post, Apr. 20, 1972, at 9, col. 1.

23. Professor Bickel, counsel for the New York Times, has observed:

> For law can never make us as secure as we are when we do not need it. Those freedoms which are neither challenged nor defined are the most secure. In this sense, for example, it is true that the American press was freer before it won its battle with the government over the Pentagon Papers in 1971 than after its victory. Before June 15, 1971, through the troubles of 1798, through one civil and two world wars, and other wars, there had never been an effort by the federal government to censor a newspaper by attempting to impose a restraint prior to publication, directly or in litigation. That spell was broken, and in a sense freedom was thus diminished.
>
> But freedom was also extended in that the conditions in which government will not be allowed to restrain publication are now clearer and perhaps more stringent than they have been. We are, or at least we feel, freer when we feel no need to extend our freedom. The conflict and contention by which we extend freedom seem to mark, or at least to threaten, a contraction; and in truth they do, for they endanger an assumed freedom, which appeared limitless because its limits were untried. Appearance and reality are nearly one. We extend the legal reality of freedom at some cost in its limitless appearance. And the cost is real.

Bickel, *The "Uninhibited, Robust and Wide-Open" First Amendment*, 54 Commentary 60, 61 (1972).

1917. It was enacted after a series of legislative debates, amendments and conferences that may fairly be read as excluding criminal sanctions for well-meaning publication of information no matter what damage to the national security might ensue and regardless of whether the publisher knew its publication would be damaging. Despite the apparent thrust of the legislative history, however, the language of the statutes has to be bent somewhat to exclude publishing national defense material from its reach, and tortured to exclude from criminal sanction preparatory conduct necessarily involved in almost every conceivable publication of defense matters.

It is the apparent reach of the language of these provisions, particularly 18 U.S.C. § 793(e), that attracted the Justices' dicta. In most such cases of conflict between a statute's language and evidence of the legislators' intent, there is soundness in the view, as Holmes put it, that "we do not inquire what the legislature meant, we ask only what the statute means."[24] Here, however, the legislative intention behind the Espionage Act is given added significance because Congress has, since 1917, repeatedly been told by Executive Branch sponsors of broader statutes that the present laws do not cover publication of secret information damaging to national security. No prosecution premised on publication has ever been brought under the espionage laws, even though numerous opportunities have been presented. Moreover, the prosecution of Daniel Ellsberg and Anthony Russo for unlawful retention of defense information under subsection 793(e) was the first effort to apply the espionage statutes to conduct preparatory to publication.

The discrepancy between legislative intent and apparent effect complicates the choice of an analytic approach to the materials. Our resolution of the problem is to provide an initial overview of the statutes and their legislative history. Then we will present a detailed analysis of the individual statutory provisions and the legislative record that generated them, and interweave the pertinent case law that has interpreted them.

A. *The Espionage Statutes*

The relevant espionage statutes are codified in sections 793-798 of Title 18 of the United States Code. The basic provisions are sections 793 and 794. Section 794 contains comprehensive provisions bearing on transfer of defense information to foreigners. Subsection 794(a) punishes actual or attempted communication to a foreign agent of any document or information "relating to the national defense," if the communication is "with intent or reason to believe that it [the information] is to be used to the injury of the United States or to the advantage of a foreign nation." Subsection 794(b), which is applicable only in time of war, also deals with transfer of information to foreigners and prohibits collecting, recording, publishing, or communicating

24. O. HOLMES, COLLECTED LEGAL PAPERS 207 (1921).

information about troop movements and military plans "with intent that the same shall be communicated to the enemy." Subsections 794(a) and 794(b) thus create offenses involving the intentional transmission of information to foreigners. Both subsections also criminalize preparatory conduct intended to achieve the proscribed results; subsection 794(a) expressly prohibits attempts, and subsection 794(b) accomplishes much the same result, as it prohibits collecting and recording the protected information with intent to communicate it to an enemy. Subsection 794(c) makes criminal, and punishes equivalently with the completed offense, conspiracies to violate the other subsections.

In addition to section 794's seemingly comprehensive coverage of espionage activities, section 793 defines six offenses, each involving conduct which would be preliminary to foreigners' acquisition of information. Subsections 793(a) and 793(b) prohibit entering an installation or obtaining or copying a document "connected with the national defense" for "the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." Subsections (c), (d), and (e) are more sweeping, and make criminal receipt of material knowing that it has been obtained in violation of other espionage provisions, communication of defense-related material or information to any person not entitled to receive it, and retention of such information. Subsections 793(d) and 793(e) proscribe willful conduct, while subsection (c) appears to prohibit any receipt of defense information by one who knows of an actual or contemplated breach of the espionage laws. Because these statutes do not explicitly on their face require an ulterior intent to harm the United States, subsections (c), (d), and (e) may make criminal nearly all acquisitions by newspapers of "national defense" information, a term defined so broadly by the courts that it comprehends most properly classified information. Congress, however, did not understand the provisions to have that effect, and they have never been so employed.

Other important provisions of Title 18 directed at breaches of security are section 798, which prohibits publication of information dealing with the special category of communications intelligence, and section 795, which prohibits photographing or making a graphical representation of any vital military equipment or installation that the President has defined "as requiring protection against the general dissemination of information relative thereto," without first obtaining permission from the appropriate military authority. Section 797 prohibits subsequent publication of such a photograph.

The major questions concerning the espionage statutes are: (1) what type of revelation or communication is a necessary element of the particular offense, and if so, is it accomplished, in the statutory sense, by publication or preparatory communications; (2) what state of mind with respect to the consequences

for United States' interests is made a material element of the different offenses, and how should the mental state of a person who publishes information be characterized under the various culpability standards; and, (3) what information is subjected to statutory restraints under various standards ranging from "information related to the national defense" to "classified communications intelligence."

These central questions of coverage cannot be satisfactorily resolved by analysis only of statutory language and judicial constructions. Therefore, legislative history becomes of necessity a major interpretive resource. Although the history of these statutes is more than usually confused, ambiguous, and voluminous, neither we nor, more importantly, the courts have any choice but to turn to it for enlightenment.

B. *The Legislative History*

The basic provisions of sections 793 and 794 of the Code were enacted in the Espionage Act of 1917 and have remained almost unchanged since its passage. Congress, however, has grappled with the problems of accommodating secrecy and public speech on at least five occasions since 1911. In each instance, the legislative debates have focused on the problem of how to protect military secrets from spies without promulgating broad prohibitions that would jeopardize the legitimate efforts of citizens to seek information and express views concerning national security.

The Defense Secrets Act of 1911[25] was the first attempt by Congress to

25. 36 Stat. 1804 (1911). This statute provides:

SEC. 1. That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States, or in the possession or under the control of the United States or any of its authorities or agents, and whether situated within the United States or in any place noncontiguous to but subject to the jurisdiction thereof; or whoever, when lawfully or unlawfully upon any vessel, or in or near any such place, without proper authority, obtains, takes, or makes, or attempts to obtain, take, or make, any document, sketch, photograph, photographic negative, plan, model, or knowledge of anything connected with the national defense to which he is not entitled; or whoever, without proper authority, receives or obtains, or undertakes or agrees to receive or obtain, from any person, any such document, sketch, photograph, photographic negative, plan, model, or knowledge, knowing the same to have been so obtained, taken, or made; or whoever, having possession of or control over any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and without proper authority, communicates or attempts to communicate the same to any person not entitled to receive it, or to whom the same ought not, in the interest of the national defense, be communicated at that time; or whoever, being lawfully intrusted with any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and in breach of his trust, so communicates or attempts to communicate the same, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

SEC. 2. That whoever, having committed any offense defined in the preceding section, communicates or attempts to communicate to any foreign government, or to any agent or employee thereof, any document, sketch, photograph,